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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

ALLEN L. FAILS, et al.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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ARGUMENT

I. The Right To Be Free From Coerced Union Speech And Association Is A Fundamental First Amendment Right Entitled To Full Constitutional Protection

Respondent Railway Clerks ("BRAC") say little on the substantive constitutional questions in this case. BRAC merely argues that, as a matter of legislative history, all of the union activities at issue here are "germane" to collective bargaining, and that *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), has settled that the plaintiff employees constitutionally may be charged for these activities. Res. Br. at 11-25.[1] *Hanson* cannot be read so broadly.

All that *Hanson* held was that Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1976), in authorizing agreements conditioning employment on payment of union fees, was constitutional *on its face*. *Machinists* v. *Street*, 367 U.S. 740, 746-49 (1961); *see Hanson*, 351 U.S. at 235-38 & nn. 7-8. Because of the nature of the case records, in *Hanson* and in each of the three subsequent challenges to union spending practices to reach the Court, no attempt was made to demarcate exactly the types of expenditures which are lawfully chargeable to dissenters. The Court specifically reserved the question of whether non-political union activities, such as death benefit funds and social activities, are among the purposes for which compelled fees lawfully may be expended. *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 236-37 & n.33 (1977); *Railway Clerks* v. *Allen*, 373 U.S. 113, 121 (1963); *Street*, 367 U.S. at 768-70 & n.18.

Abood characterized "the difficult line-drawing questions" left open by it and its precursors as "constitutional questions." 431 U.S. at 236-37 & n.34. Under the Railway Labor Act, the task is first to determine whether each

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[1] "Res. Br." refers to the Brief for Respondents; "AFL-CIO Br." and "NEA Br.," the respective briefs for the American Federation of Labor-Congress of Industrial Organizations and National Education Association as *amici* in support of respondents; "Pet. Br.," the Brief for Petitioners. References to appendices and the record are as explained in Pet. Br. at 1 n.1.

category of union expenditures is one for which the statute permits the use of compulsory dues. If it is not, the inquiry ends there. But if the activity is one for which the Act permits coerced fees to be used, then the Court must determine whether that type of compulsory subsidization is countenanced by the first amendment. The answer to the first question does not automatically answer the second, as BRAC pretends.

BRAC's affiliate, the American Federation of Labor and Congress of Industrial Organizations, advances the constitutional arguments not made by BRAC. Ignoring decades of first amendment precedent, *amicus* AFL-CIO urges that an employee's right to be free from coerced participation in union speech and association is an attenuated right entitled only to limited protection.

First, the AFL-CIO asserts that the first amendment protects the right *not* to speak and associate to a lesser degree than it protects the right *to* speak and associate. AFL-CIO Br. at 4, 14-20. However, the amendment protects explicitly "the *freedom* of speech" and implicitly "the *freedom* of an individual to associate for the purpose of advancing beliefs and ideas." U.S. Const. amend. I (emphasis added); *Abood*, 431 U.S. at 233 (emphasis added). Neither speech nor association is free when it is compelled, any more than either is free when suppressed. The freedoms guaranteed by the Constitution include "both the right to speak freely and the right to refrain from speaking at all," *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and "[t]he right to belong—or not to belong," *Lathrop* v. *Donohue*, 367 U.S. 820, 881-82 (1961) (Douglas, J., dissenting).[2]

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[2] The right is one of refraining from speaking or belonging *at all*, as well as one of speaking or associating as one wishes. *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), are not distinguishable on a "negative" versus "affirmative" right basis. The essence of the constitutional violation in the case of a patronage dismissal is not that the employees are discharged because they support another political party, but that they are discharged for *not* affiliating with the party in power. *Branti*, 445 U.S. at 517.

A corollary of these "concomitant" and "complementary" rights, *Wooley*, 430 U.S. at 714, is the principle that state action requiring speech or association is as much a "restraint" as governmental action preventing or restricting speech or association. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974); *see Elrod* v. *Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion). Neither type of restraint is less obnoxious because the persons restrained are otherwise free to speak and associate as they wish. *See Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 541 n.10 (1980); *Street*, 367 U.S. at 778 (Douglas, J., concurring).

Both aspects of the freedoms of speech and association are of equal dignity. The "lesser negative rights" theory was rejected in *Abood:* "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. at 234. As Justice Douglas said, anticipating *Abood*, laws curtailing the right not to associate should be treated "like any that touch on First Amendment rights": "exceptional circumstances should be shown," and the law must "be 'narrowly drawn' so as to be confined to the precise evil within the competence of the legislature." *Lathrop*, 367 U.S. at 882 (dissenting opinion) (citation omitted). Indeed, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 633 (1943), suggests that the governmental interest required to justify compulsion of belief, speech, or association must be "even more immediate and urgent" than that necessary to sustain suppression of those freedoms.[3]

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[3] *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-88 (1980), does not change these principles. *See Consolidated Edison*, 447 U.S. at 552 & n.2 (Blackmun, J., dissenting); *Pruneyard*, 447 U.S. at 96-101 (Powell, J., concurring in part). The operative factor in *Pruneyard* was the specialized type of property involved: a shopping center which "by choice of its owner" had been opened "to the public at large." 447 U.S. at 87 (opinion of the Court), 90 (Marshall, J., concurring). Here, the personal funds of the employees are not public funds in any sense, and the union obtains

Second, the AFL-CIO contends, based primarily on an erroneous interpretation of *Buckley* v. *Valeo,* 424 U.S. 1 (1976), that the rights at stake here are attenuated because the only sense in which the plaintiffs are compelled to associate or speak is by the payment of a small sum of money to the union. AFL-CIO Br. at 4-5, 12-14 & n.9. However, *Buckley* emphasized that the dependence of the exercise of first amendment freedoms upon the expenditure of money does not "reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16. It held that "contribution and expenditure limitations both implicate fundamental First Amendment interests," and required the government to demonstrate that contribution limitations served "a sufficiently important interest" by "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 23-29.

Moreover, the infringement on protected freedoms in this case is greater in kind than that involved in *Buckley.* At issue there was whether political speech and association could be restricted in amount or *volume.* At issue here is what activities constitutionally may be encompassed in a definition of "collective bargaining." This is not an issue of how much speech and association of any particular type may be compelled, but of the subjects on which *any* speech and association may be required—*i.e.,* of *content*—a question mandating strict scrutiny. *See, e.g., Carey* v. *Brown,* 447 U.S. 455, 460-63 & nn. 6 & 7 (1980). Cases such as *First National Bank* v. *Bellotti,* 435 U.S. 765 (1978), *Consolidated Edison,* and *Elrod,* in which a prohibition or compulsion of speech or association with regard to certain subjects was struck down, are closer analogs to this case than cases dealing with limitations.[4]

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those monies through compulsion. This is a "critical distinction." *First National Bank* v. *Bellotti,* 435 U.S. 765, 794 n.34 (1978). Moreover, unlike the property owner in *Pruneyard,* individual employees have no means of disavowing the union's views when it purports to speak for the employees for whom it is exclusive representative.

[4] *California Medical Ass'n* v. *FEC,* 453 U.S. 182 (1981), and *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), are

Because "any assessment of [an employee's] salary is tantamount to coerced belief," *Elrod*, 427 U.S. at 355 (plurality opinion), the relative amount of money used by the union for the subjects in question in this case is irrelevant to whether Congress could have sanctioned assessments for those purposes. As *Abood* noted, quoting James Madison, the author of the first amendment, " 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' " 431 U.S. at 234 n.31; *see Elrod*, 427 U.S. at 359 n.13 (plurality opinion).

Third, the AFL-CIO theorizes that the interests at stake in assessing the constitutionality of government action in the form of a statute requiring an individual financially to support "beneficial" activities through a private organization are no greater than the minimal first amendment interests involved in a disbursement of tax dollars to a private entity. AFL-CIO Br. at 7-9, 11-12, 23-27. This analogy is rejected by the very cases that the AFL-CIO cites.

Regan v. *Taxation With Representation*, 103 S. Ct. 1997, 2001 & n.7 (1983), specifically distinguished a case in which Congress has subsidized private first amendment activity "out of public monies" from one in which an ordinance "regulated First Amendment activity by limiting individuals' expenditures of their own money on political speech." The Court recognized that " '[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law. . . .' " *Id.* at 2003. Similarly, *Buckley* observed that

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limitation cases. To the extent that the plurality in *California Medical Association* suggests that some infringements of first amendment rights can be sustained without strict scrutiny, it has been overruled by *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981). The latter case emphasized that "regulation of First Amendment rights is always subject to exacting judicial review." *Id.* at 294, 298; *see id.* at 302 (Blackmun, J., concurring in the judgment).

the use of public money to finance the campaigns of candidates for president "is like any other appropriation from the general revenue" and "involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree," citing the opinions of Justices Black and Douglas in *Lathrop* and *Street* that such compulsion would be unconstitutional. 424 U.S. at 91 & n.124.[5]

Fourth, the AFL-CIO argues that coercion to support the union activities at issue here is not subject to strict scrutiny because those activities are "purely social or purely economic," rather than "political" or "ideological," and "have no obvious connection to the communication of any ideas whatever." AFL-CIO Br. at 5-6, 9-11, 16 n.12, 27-30.

The AFL-CIO's argument was unequivocally rejected in *Abood:* "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." 431 U.S. at 231 & n.28. Because freedom of association is as fundamental as freedom of expression, *Buckley*, 424 U.S. at 25, this principle that the amendment's protection is "not confined to any field of human interest" applies equally to association. *Thomas* v. *Collins*, 323 U.S. 516, 530-31 (1945).

Admittedly, where speech is purely commercial, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 562-63 (1980),[6] or where the speech of a public employee "touche[s] upon matters of public concern in only a most limited sense" and "is most accurately

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[5] *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 103 S. Ct. 948 (1983), also is inapposite because it merely concerned a government subsidy, in the form of access to nonpublic government property.

[6] "Commercial speech" is "expression related solely to the economic interests of the speaker and its audience," *i.e.*, " 'speech proposing a commercial transaction.' " *Central Hudson Gas*, 447 U.S. at 561-62. If the communication concerns lawful activity and is not misleading, government regulation of even commercial speech must have more than just a rational basis to be permissible under the first amendment. *Id.* at 564-66.

characterized as an employee grievance concerning internal office policy," *Connick* v. *Myers*, 103 S. Ct. 1684, 1691-94 (1983),[7] the first amendment provides less protection than it does for other speech.

But, the only BRAC activities comparable to commercial speech, or speech primarily concerning internal employer-employee affairs that only incidentally involves matters of public concern, are those which it performs as exclusive bargaining agent for employees of Western Airlines. When BRAC negotiates an agreement for those employees, adjusts employee grievances against Western Airlines, or settles disputes over interpretation of the contract, it engages in speech which proposes a commercial transaction and directly relates to the economic interests of the employees for whom it speaks and the employer which is its audience. The first amendment impact of these activities is usually only limited and incidental. *Abood*, 431 U.S. at 221-23.

However, unions exist for more purposes than serving in the narrow role of exclusive representative in a particular bargaining unit. They also are voluntary associations formed " 'to do those things which the members authorize the union to do in their interest and on their behalf.' " *Retail Clerks, Local 1625* v. *Schermerhorn*, 373 U.S. 746, 753-54 & n.6 (1963). As Justice Frankfurter observed in *Street*, in this country and "particularly" in the railroad industry, labor unions are part of a "movement," embody a "philosophy," and engage in political activity—candidate support and lobbying—"indissolubly relating to the immediate economic and social concerns that are the *raison*

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[7] The holding of *Connick* is limited. When a public employee's speech does not implicate the government's interests as an employer of that employee, regardless of its subject matter, or when a public employee speaks upon matters of public concern which "only tangentially and insubstantially" involve the direct employer-employee relationship, then the employee's discharge must be scrutinized in the same manner as any state action infringing on a citizen's first amendment rights. 103 S. Ct. at 1695 & n.1 (Brennan, J., dissenting); *Pickering* v. *Board of Educ.*, 391 U.S. 563, 571-74 (1968); *see Branti*, 445 U.S. at 515-16.

d'être of unions." 367 U.S. at 798, 800-01, 805, 812-16 (dissenting opinion). In short, unions as *institutions* are pervasively ideological in nature. *See Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 965 n.5a (D.P.R. 1983) (discussing the definition of "ideological" and "political" as used in *Abood*).

When a union acts other than as a bargaining agent performing its statutory functions in a particular unit, its activities are not mere commercial speech and association. Speech and association concerning unions, pro and con, and labor relations "are not matters of mere local or private concern." Free discussion and association concerning such subjects is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," and fully protected by the first amendment. *Thornhill* v. *Alabama*, 310 U.S. 88, 102-05 (1940); *accord Thomas*, 323 U.S. at 530-32, 536-38; *see Mine Workers, District 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222-23 (1967).

Finally, the AFL-CIO suggests that, because the actual decisions to use funds for institutional purposes are made by union members "in accord with democratic procedures," not by the government, "the degree of governmental action, and therefore of constitutional infringement in this situation, is marginal at best." AFL-CIO Br. at 6-7, 20-22; *see* NEA Br. at 11-13.

That union decisions may be made democratically is constitutionally irrelevant. "The very purpose of the Bill of Rights was . . . to place [certain subjects] beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts." First amendment rights "may not be submitted to vote." *Barnette*, 319 U.S. at 638. Majority rule in union spending decisions does not protect minority rights: "By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority." *United States* v. *Boyle*, 482 F.2d 755, 763 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

Moreover, the union's decision itself is not the concern. In neither the Railway Labor Act nor Michigan's public

labor relations act did the legislature require the making of a compulsory unionism agreement or involve the government in the decisions as to how exacted funds are spent. Nonetheless, as to both statutes the Court found that the legislative authorization of the agreements and sanction of union use of the money exacted thereby, and judicial enforcement of the agreements, were governmental action requiring constitutional scrutiny. *Abood*, 431 U.S. at 232-33; *Hanson*, 351 U.S. at 232 & n.4; *see Street*, 367 U.S. at 746-50 (opinion of the Court), 777 & n.3 (Douglas, J., concurring), 789 & n.13 (Black, J., dissenting).

"[A] State normally can be held responsible for a private decision . . . when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). In *Hanson*, *Street*, and *Abood* the Court found that legislative authorization and potential judicial enforcement of union decisions to use coerced dues for political and ideological purposes would (*Hanson* and *Street*) and did (*Abood*) constitute the necessary significant encouragement or coercive power. Here, if the Railway Labor Act sanctions, and the courts enforce, BRAC's decisions to use the plaintiffs' compulsory dues for institutional purposes, then the federal government is responsible for those decisions.[8]

The degree of constitutional scrutiny of compulsory unionism agreements simply does not depend upon the directness of the governmental action present in a particular case:

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[8] Even if the Act is construed to prohibit expenditure of compulsory dues for institutional as well as political purposes, Congress' choice (or omission) of procedures to protect against prohibited expenditures requires constitutional scrutiny. "While private misuse of a . . . statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints," if the state action test is otherwise met in the particular "circumstances of the case." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939, 941 (1982).

> Mr. Justice Douglas, the author of *Hanson*, expressly repudiated that suggestion:
> "Since neither Congress nor the state legislatures can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly." *Street*, 367 U.S., at 777 (concurring opinion).

Abood, 431 U.S. at 227 n.23.

II. Because Fundamental Rights Are At Stake, The Union Has A Heavy Burden In Establishing Both Permissible Expenditures And The Validity Of The Procedures By Which Employee Rights Purportedly Are Protected

Where fundamental first amendment freedoms are at stake, the party seeking to abridge those freedoms normally must assume the burdens of demonstrating a compelling governmental interest and of showing that the means utilized to serve that interest are as narrowly drawn as possible. *E.g., Consolidated Edison Co.*, 447 U.S. at 540. This BRAC does not deny. BRAC even "unhesitatingly accept[s]," Res. Br. at 44, precedents such as *Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958), which hold that where one party has a fundamental first amendment interest at stake, due process requires that the other party "bear the burden of persuasion" in drawing the fine "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished." Nonetheless, BRAC argues that, because the plaintiffs' rights are balanced by equally important constitutional rights of its voluntary members, its burdens of proof in this case are not so heavy as those precedents imply. Res. Br. at 24-25, 43-44.

In fact, no constitutional rights of voluntary union members are affected by the determination of the obligations of dissenters. The Constitution does not guarantee workers the right to engage in collective bargaining. *Babbitt* v.

Farm Workers, 442 U.S. 289, 312-14 (1979). *A fortiori*, union members have no constitutional right to require other employees to contribute to the union's bargaining costs. The right to such compulsion has no basis higher than statute.

Neither does the majority have a constitutional right to the assistance of the state in making its political and institutional advocacy more effective through the use of dissenters' monies for bargaining purposes, thus freeing other union assets to be used for political and institutional purposes. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley*, 424 U.S. at 48-49. The right of workers to associate in unions and to advocate improvement in working conditions cannot be construed as a constitutional guarantee that other workers may be compelled to support that association and advocacy. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-31 (1949).

" '[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation.' " *Regan*, 103 S. Ct. at 2003. Congress has not required any union to be an exclusive representative. A union's *voluntary* decision to assume the privileges of that status carries with it the commensurate duty of fair representation. *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192, 198-204 (1944). The performance of that duty has costs, but the members' interests in expending dues for political and institutional purposes have not, therefore, been burdened *by government*. The same is true of a union's *voluntary* assumption of the privilege of a union shop, which necessarily carries with it a commensurate fiduciary duty of accounting for the use of funds exacted from dissenters.

Thus, because there are fundamental first amendment interests at stake only on the plaintiffs' side, the union has a three-fold burden: (1) it must establish that each par-

ticular type of union expenditure sanctioned by the statute directly serves the governmental interest advanced by the union shop, *see Elrod*, 427 U.S. at 368 (plurality opinion); (2) even if the definition of permissible costs is drawn as narrowly as possible, the union must demonstrate that the procedures under the statute are adequate to prevent coerced subsidization of impermissible costs, *see Speiser*, 357 U.S. at 520-21; and, (3) the union must prove the actual proportion of permissible expenditures, both at trial and in any procedure selected to provide future protection for dissenters' rights, *see Abood*, 431 U.S. at 239 n.40. This is a burden of persuasion, not just of going forward with the evidence. *See Elrod*, 427 U.S. at 368 (plurality opinion); *Speiser*, 357 U.S. at 525-26.[9]

The issue of burden of proof also involves a question of the degree of proof required. BRAC concedes that " '[The Court has] required proof by clear and convincing evidence where particularly important individual interests or rights are at stake.' " Res. Br. at 43, quoting *Herman & MacLean* v. *Huddleston*, 103 S. Ct. 683, 691 (1983). Nonetheless, BRAC argues that the cases plaintiffs cite did not require the party seeking to abridge first amendment rights to provide clear and convincing evidence, and that *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), refutes plaintiffs' position. Res. Br. at 44-46.

But plaintiffs do not say that the clear and convincing evidence standard is appropriate in every case in which a party asserts first amendment rights, only that it is required for determinations which, if made erroneously against the individual, inevitably result in the abridgment of fundamental liberty. *Compare Abood*, 431 U.S. at 236-37,

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[9] BRAC suggests that *Allen's* "burden of proving" the proportions of expenditures, 373 U.S. at 122, refers only to the burden of producing evidence. Res. Br. at 42 n.27. However, BRAC cites neither cases in which first amendment interests were at stake, as in *Elrod* and *Speiser*, nor cases in which operative facts were peculiarly within the knowledge of one party, as in, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 512 F.2d 527, 538 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976).

with Speiser, 357 U.S. at 525-26. *Mt. Healthy* was not such a case. In *Mt. Healthy*, if the employee would have been discharged for employment-related reasons even in the absence of the protected conduct, there was no effect at all on first amendment rights; if the employee was discharged for the protected conduct, that conduct, as in *Connick*, *see* pp. 6-7 *supra*, only incidentally involved matters of public concern, and the effect on first amendment interests was limited. Here, if a union expenditure is related to collective bargaining, it has a limited impact upon first amendment rights, *Abood*, 431 U.S. at 222; *but*, if it is not so related, then it abridges fundamental liberty, *id.* at 233-36.

Speiser does not specifically hold that a clear and convincing evidence standard is among the "sensitive tools" required for the separation of fundamental freedoms from those not so carefully protected. It did not have to, because the procedure there did not even place the burden of persuasion on the correct party. But *Speiser's* comparison of that case to a criminal case, in which proof beyond a reasonable doubt is required, implies a need for more than a mere preponderance of the evidence where the "transcendent value" of speech and association is involved. 357 U.S. at 525-26. *Elrod* goes further. There it was held that the state had the burden of establishing that a particular employee occupied a policymaking position for which patronage was constitutionally permissible, "cases of doubt being resolved in favor of the particular [employee]." 427 U.S. at 368 (plurality opinion). By definition, a "preponderance of the evidence" does not remove doubt: "in the last analysis, [it] means probability of the truth." 30 Am. Jur. 2d *Evidence* § 1164 (1967). Given the basic freedoms at issue in this case, clear and convincing evidence must be required of the union so that instances of doubt are resolved in favor of the employees.

"Absolute precision in the calculation" of the proportion of permissible and impermissible expenditures is not required even under a clear and convincing evidence standard. *Allen*, 373 U.S. at 122. But *some* degree of precision clearly is necessary under any standard of proof, and here

it is appropriate to require BRAC to provide that degree of precision flowing from adherence to generally accepted accounting principles.

BRAC and *amicus* NEA complain that the use of accounting records which segregate permissible costs would be unduly burdensome. Res. Br. at 49-50; NEA Br. at 6-10. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of [individual constitutional rights]." *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 646-47 (1974).[10] Moreover, as noted in another context, it "is not unduly burdensome" to require an organization receiving a governmental benefit, because it engages in one type of activity, to segregate its funds and keep records adequate to show that contributions received for that purpose are not used to pay for another category of activity. *Regan*, 103 S. Ct. at 2000 n.6. No less should be required of unions which seek the privilege of coercing bargaining fees from employees.

III. A Union-Administered Dues Reduction Scheme Inherently Does Not Provide Due Process Or Prevent Coerced Speech And Association

BRAC asserts that the issue of the adequacy of a rebate, or demand and return, scheme "is academic in this case" because the court of appeals affirmed the portion of the district court's judgment providing for a reduction of future dues. Res. Br. at 11. The employees are not so confident that this feature of the judgment was left intact. Pet. Br. at 32. If the Court agrees that a dues reduction

[10] The litigation horrors catalogued by the NEA are more burdensome to dissenting employees than they are to unions. Undoubtedly the rights of many employees are violated without audible protest because they cannot afford litigation. These are not reasons for permitting rights to be violated. Rather, if "the accounting and proof problems involved" counsel a remedy which avoids such "practical" difficulties, the only remedy which also prevents the infringement of fundamental freedoms is one which releases protesting workers from all financial obligations to the union. *Street*, 367 U.S. at 779-80 (Whittaker, J., dissenting in part), 795-97 (Black, J., dissenting); *see id.* at 778-79 (Douglas, J., concurring).

system was affirmed by the Ninth Circuit, then that court's approval of a "rebate remedy," *Ellis* v. *Railway Clerks*, 685 F.2d 1065, 1069-70 (9th Cir. 1982) (App. Cert. 5a-6a), was unfortunate dicta. In that event, this Court should make it clear that, regardless of the outcome of this appeal, the judgment on remand must include a future dues reduction.

Moreover, the employees' challenge to the scheme approved by the lower courts is not "academic" even if it provides a reduction rather than a refund. Under the district court's judgment, the amount of the dues reduction each year is determined by BRAC. J.A. IV 366-67, 371. As a matter of law, not of fairness in fact, this requirement that objecting employees have the extent of their first amendment liberties determined by the very organization with which they have their dispute violates due process of law. Pet. Br. at 34 n.23.[11]

BRAC's scheme on its face is not the least procedurally burdensome alternative. The reduction could be made initially by a neutral arbiter. Under BRAC's system, known objectors must again step forward and request a neutral review. Such a scheme is constitutionally inadequate because it "is obviously set up to discourage the non-believers." *Schneider*, 565 F. Supp. at 976; *see Lamont* v. *Postmaster General*, 381 U.S. 301, 307 (1965).

Also, reduction of the dues by an amount determined to have been spent for impermissible purposes in a *prior* year does not "avoid the risk that [the employees'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, 431 U.S. at 244 (Stevens, J., concurring). Union spending patterns vary from year to year. *Allen*, 373 U.S. at 122. A scheme in which the union has unfettered discretion to expend a dis-

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[11] This defect would not be cured by a reduction determined by the so-called "Public Review Board," a body appointed and paid by BRAC. Pl. Ex. 1303. A scheme in which first amendment rights are determined by "a 'captive organization' . . . named by the very group it is supposed to police" "does not safeguard the rights of the dissidents." *Schneider*, 565 F. Supp. at 976; *see Glover* v. *St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969); *Steele*, 323 U.S. at 206.

senter's dues, even if reduced by an estimated amount, does not *prevent* impermissible expenditures. At best, it merely decreases the amount of the dissenters' funds available for the union to "borrow" to finance political and institutional causes. Because it does not provide for temporary escrow of dissenters' funds, or segregation of funds,[12] the dues reduction scheme adopted by the district court is inadequate under the first and fifth amendments. Pet. Br. at 33-38.

IV. Congress Did Not And Constitutionally Could Not Intend To Coerce Support For Unions As Institutions

The essence of the argument of BRAC and its *amici* on the line-drawing issue is that in *Abood* and its Railway Labor Act precursors the Court recognized that Congress' purpose in enacting § 2, Eleventh was to authorize coerced financial support of *all* union selected activities, with two narrowly limited exceptions. Res. Br. at 12-41; AFL-CIO Br. at 22-30; NEA Br. at 10-21. Those exceptions are described by *amicus* AFL-CIO as (1) "ideological communications completely divorced from [the union's] representational concerns" and (2) "political candidate expenses." AFL-CIO Br. at 28. In the unions' view, Congress sanctioned the use of coerced dues for any other purpose, no matter how ideological, and no matter how remote its relationship to the union's duties as exclusive representative in

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[12] If the union maintained a segregated fund and paid all and only bargaining costs from that fund, escrow would be unnecessary. Each employee in the bargaining unit would be assessed an equal amount for that fund, and voluntary members could also pay dues to a second fund for the union's political and institutional activities. In a given year, if the bargaining assessment based on projected expenditures proved insufficient to meet actual bargaining costs, an additional assessment could be made. If the original assessment were excessive, the excess could be refunded or carried over into the next year. Such a simple system would avoid the accounting problems created by the union's blurring of the distinction between "financial core" and voluntary members.

the employees' bargaining unit.[13]

However, the arguments which the unions use and the legislative history which they cite to support their permissive reading of § 2, Eleventh are not new. The same arguments were made in *Street* by the unions in that case and by Justice Frankfurter in dissent. *See Street*, 367 U.S. at 800-03, 811-18. In addition, the *Street* Court exhaustively examined the legislative history of the Act in general and § 2, Eleventh in particular. *Id.* at 750-70.

The result was that the Court rejected the arguments and the interpretation of the legislative history urged here by the unions: "The conclusion to which this history clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." *Id.* at 763-64. Those expenses, and those alone, were *clearly* what Congress meant to force employees to support. *Id.* at 750-64.

Moreover, the legislative history made it "abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider,'" the employee "who did not support his representative's performance of its functions under the Act." *Id.* at 764 n.15, 767. Respecting this congressional purpose, the Court "construe[d] § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money." *Id.* at 768.

Street did not "delineate the precise limits" of the unions' power under § 2, Eleventh because only the question of union political activities, including lobbying, was presented by the decisions of the Georgia courts. *Id.* at 744 n.2, 768-70 & n.17. However, the same reasoning which led the Court to hold that the unions' power under the statute

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[13] The *amici* even suggest that Congress sanctioned the use of coerced dues for lobbying for legislation which affects the employees' industry, benefits, or working conditions, and for voter registration and get-out-the-vote drives. AFL-CIO Br. at 25 n.18, 28 n.21, 29 n.23; NEA Br. at 18-21.

"is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes," *id.* at 768, applies to the union institutional activities at issue in this case.

Indeed, Justice Whittaker understood both *Hanson* and *Street* to hold that in § 2, Eleventh "Congress intended to, and impliedly did, limit the use that railway labor unions may make of [compulsory dues], only to defray the costs of negotiating and administering collective bargaining agreements—including the adjustment and settlement of disputes . . . ." *Street*, 367 U.S. at 779 (opinion concurring in part). Justice Douglas agreed, *id.* at 776 (concurring opinion), explaining that "the narrow and precise holding of the *Hanson* case" was as shown by Justice Black, *i.e.*,

> only that workers could be required to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent under authority of Congress, just as Congress doubtless could have required workers to pay the cost of such bargaining had it chosen to have the bargaining carried on by the Secretary of Labor or any other appropriately selected bargaining agent.

Id. at 787 (Black, J., dissenting). Even Justice Frankfurter, who thought that Congress authorized union political expenditures, believed that the *Street* decision "implies that Congress meant its amendment to be read as providing that members of the union may restrict their dues solely for financing the technical process of collective bargaining." *Id.* at 802 (dissenting opinion).

Such a reading of the statute is entirely reasonable. When Justice Douglas spoke of "the cause which justified bringing the group together," *id.* at 778 (concurring opinion), the "cause" to which he referred was collective bargaining, and the "group" was the bargaining unit. He did not refer to the cause of improving working conditions in the abstract, nor to the union as an institution. The purpose of § 2, Eleventh was to help defray the costs of the functions and duties which the Act *imposed* upon representatives, not of all concerted activities which the Act merely allowed or protected.[14]

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[14] *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 & n.16 (1978),

The district court and the Ninth Circuit dissent recognized that none of the institutional activities at issue here are among the functions and duties which BRAC performed as bargaining agent for employees of Western Airlines. *Ellis*, 685 F.2d at 1075-76 (Whelan, J.) (App. Cert. 14a-16a); J.A. IV 236-37, 239, 245. The consequences of this view of the limits of § 2, Eleventh are not unsettling, as BRAC claims. If joint bargaining occurs on an industry-wide basis, its costs may be allocated among all of the bargaining units involved.[15] If Grand Lodge officers and employees assist in bargaining and contract administration at a particular unit, the appropriate portion of their salaries, and of allocable overhead, can be charged to employees in that unit. If bargaining problems at a particular unit are dealt with at a convention or in a union publication, the allocable portion of the convention or publication expenses may be a chargeable cost.

Any broader view of what Congress sanctioned requires strict scrutiny of the statute. In *Buckley*, 424 U.S. at 91 n. 124, the Court impliedly endorsed the principle that the Constitution permits "no compulsion upon individuals to finance the dissemination of ideas with which they disagree." The

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acknowledges this distinction between collective bargaining activities and other concerted activities, and that unions may be prohibited from using compulsory dues for some activities which are protected by the Act.

[15] Joint bargaining is not the same as "pattern" bargaining. A contract, or litigation, in one unit may set a precedent for labor relations in another. That effect is the same even if the bargaining agents in the two units are different unions. Congress could not rationally have intended that the determinant of whether the cost of an activity may be taxed to dissenting employees is an affiliation vote in another bargaining unit or the fact that the activity provides indirect economic "benefit." The only "benefits" which justify the compulsory fee are those received by employees from the bargaining activities of their exclusive representative which must be performed on behalf of " 'all employees . . . , union and nonunion,' *within the relevant unit*" and which, therefore, presumptively provide "benefits of union representation that *necessarily* accrue to all employees." *Abood*, 431 U.S. at 221-22 (emphasis added).

Court there cited the opinions of Justices Black and Douglas in *Lathrop* and *Street*. Among the cited passages is one which states eloquently why § 2, Eleventh cannot survive strict scrutiny if it is construed as the unions contend:

> I believe the First Amendment bars use of dues extorted from an employee by law for the promotion of causes, doctrines and laws that unions generally favor to help the unions, as well as any other political purposes. I think workers have as much right to their own views about matters affecting unions as they have to views about other matters in the fields of politics and economics. . . . In my view, § 2, Eleventh can constitutionally authorize no more than to make a worker pay dues to a union for the sole purpose of defraying the cost of acting as his bargaining agent. Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs.

Street, 367 U.S. at 790-91 (Black, J., dissenting).

Justice Douglas noted in *Lathrop*, 367 U.S. at 878 (dissenting opinion), that "[t]he groups whose activities are or may be deemed affected with a public interest are indeed numerous." The precedent which the unions would establish in this case is one which would "practically give *carte blanche* to any legislature to put . . . into goose-stepping brigades," *id.* at 884, *any* "group of individuals with some common role or affiliation." *See* AFL-CIO Br. at 23-27. "Those brigades are not compatible with the First Amendment." *Lathrop*, 367 U.S. at 885 (Douglas, J., dissenting). Section 2, Eleventh must be construed as not authorizing the prototype brigades.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit and grant the relief requested in the Brief for Petitioners.

Respectfully submitted,

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